



IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 2 OF 2011

REPUBLIC.....PROSECUTION

VERSUS

1. KASSIM MOHAMMED NGAO

2. BABU JOHN MUSYOKI

3. KOMBO PATRICK NGOJA

4. MATANO MWAMBURASH.....ACCUSED

JUDGMENT

The four accused persons namely **KASSIM MOJHAMED NGAO** (hereinafter referred to as the 1st accused), **BABU JOHN MUSYOKI** (hereinafter referred to as the 2nd accused), **KOMBO PATRICK NGOJA** (hereinafter referred to as the 3rd accused) and **MATANO MWAMBURASH** (hereinafter referred to as the 4th accused) all face a charge of **MURDER CONTRARY TO SECTION 203 as read with SECTION 204 OF THE PENAL CODE**. The particulars of the charge were as follows:

“On the 1st day of January, 2011 at about 1.00 a.m. at Bangoni village, Mlafyeni sub-location, Mwaluphamba Location in Kwale Country within Coast Region, jointly with others not before court murdered SITA NDARO HENZI.”

The four accuseds were all arraigned before the High Court in Mombasa on 22nd February, 2011 when the information was read out to them. Each one entered a plea of ‘*Not Guilty*’ to the charge. The hearing commenced on 13th October, 2011. The prosecution led by **MR. GIOCHE** learned state counsel called a total of thirteen witnesses in support of their case. **MR. CHIDZIPHA** Advocate represented all four accused persons. The matter was initially before **HON. JUSTICE FRANCIS TUIYOTT** who heard the evidence of the first nine (9) witnesses. Following the transfer of the Honourable Judge to Busia High Court I took over the case and heard the testimony from the remaining three (3) witnesses. The brief facts of the case were as follows.

On 31st December, 2010, the deceased his lover named ‘*Margaret*’ **PW5** and others including the four (4) accused persons were all merry-making in anticipation of the New Year. They congregated at a mnazi den run by one **KARANI MWATUMVI HAVI**. From the evidence of all the prosecution witnesses the deceased (who was a married man) was involved in a long-standing and openly known adulterous affair

with 'MM' PW5. The said 'M' was the wife of JK PW4 and was the mother of 'Babu' the 2nd accused. Evidence adduced in court was that PW4 the husband of PW5 had severally warned her against this relationship but she paid him no heed. The affair continued with the full knowledge (and apparent) acquiescence of PW4 who despite knowing of the affair still considered PW5 as his wife. As the events of 31st January, 2010 show all these parties would meet and socialize together in the village.

On that material day whilst in the mnazi den the deceased and PW5 were sitting together and kissing and dancing together. These actions angered the other patrons in the bar including PW4 (the husband) and 2nd accused (the son of PW5). The 1st accused held the deceased by the hand and led him out of the bar. However when the 1st accused returned to the bar the deceased followed him back in. Then 1st, 2nd, 3rd and 4th accused left the bar with the deceased saying that they were escorting him to his house as he was too drunk to go on his own. The deceased was never seen alive again. His disappearance was reported to the chief and then to the police. A search was launched. On 4th January, 2011 the badly decomposing body of the deceased was found lying in a thicket. Police were called in. They removed the body to the mortuary where autopsy was performed. The police launched investigations into the matter which led to the arrest of the four accused persons who were eventually arraigned in court and charged with the offence of murder. Unfortunately during the course of the trial on 8th June, 2014 the 4th accused 'Matano Mwamburash' fell ill and passed away at the Provincial Coast General Hospital. The charges against the 4th accused were therefore withdrawn. As such the hearing proceeded in respect of only the 1st, 2nd and 3rd accused persons. The prosecution having now closed its case the court is obliged to analyze and assess the evidence on record in order to determine whether a *prima facie* case has been made out sufficient to warrant the three accused persons to be called upon to give their defence to the charge.

The offence of murder is defined by section 203 of the Penal Code as follows:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”

The prosecution is therefore required to prove the following four (4) crucial ingredients in order to prove a charge of murder

1. The death of the deceased.
2. The cause of the death of the deceased.
3. Proof that the deceased met his death as the result of an unlawful act or omission on the part of the accused person(s).
4. Proof that said unlawful act or omission was committed with malice aforethought.

The fact and cause of death of the deceased have readily been proved. PW1 M M H the wife of the deceased told the court that the body of her husband was found lying dead and badly decomposed, eaten by maggots on 4th January, 2011 in a thicket. PW13 SERGEANT MICHAEL ODUOR is a gazetted scenes of crime officer. He told the court that he developed a film passed on to him by the officer commanding Kwale police station. He produces the photographs in court Pexb3. They depict the decomposing body of an adult man lying on his stomach in a thicket. Evidence on the cause of death was tendered by PW9 DR. MWIKA MWANAHAMISI a medical officer attached to Kinango District Hospital. He produces the post-mortem report dated 4th January, 2011. Externally the body was noted to be badly decomposing with maggots all over. Upon examination the doctor noted two cut wounds through the mouth which totally disfigured the face. The cause of death was found to be hemorrhage due to multiple cuts to the body. PW9 produced the post mortem report as an exhibit in the case Pexb1.

Having proved the death as well as the cause of death of the deceased the prosecution is also required to tender evidence to prove that it was the three (3) accused or any one of them who stabbed and/or assaulted the deceased leading to his death. There was no eyewitness to the murder of the deceased. The prosecution is relying on circumstantial evidence in order to prove their case. In the case of **REX VS. KIPKERING ARAP KOSKE & ANOTHER (1949) 16 E.A.C.A. 135**, the Court of Appeal for Eastern

Africa held that

“In order to justify the inference of guilt [on the basis of circumstantial evidence], the exculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

In the case of **KARIUKI KARANJA VS. REPUBLIC [1986] KLR** the court held

“In order for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused..... The burden of proving facts justifying the drawing of that inference is on the prosecution.”

The evidence from the prosecution witnesses is that they were all in a mnazi den on the night on 31st December, 2010 celebrating the impending New Year. It is alleged that the deceased who was a lover of the wife of **PW4** was behaving inappropriately with the said lady – dancing with her and kissing her in the presence of her husband and son Accused 2. Obviously the inference here is that Accused 2 and his father may have been so angered by the actions of the deceased that they were been motivated to eliminate him. However there is evidence that the love affair between the two was well-known to everybody in the village. **PW4** refers to the lady ‘**Margaret Mumbua**’ **PW5** as his ex-wife. Indeed **PW4** told the court that the police did initially arrest him as a suspect in the death of the deceased. He was held in custody for thirteen (13) days but was eventually released by police due to lack of evidence. As for Accused 2 the evidence is that they were in the bar enjoying drinks together. No witness saw Accused 2 argue with the deceased or even threaten him in any way.

PW8 ‘*Karani Mwatumi*’ was the owner of the bar in question. He told the court that at some point during the merry-making the 1st, 2nd and 3rd accuseds took the deceased outside saying that they were taking him home to Mwaluphamba as he was overcome due to drinking. They all left the bar together. The deceased was never seen alive again. Thus suspicion is placed upon the accused persons because they were the last persons seen with the deceased while he was alive. However suspicion alone cannot form the basis for a conviction. In the case of **JOAN CHEBICHII SAWE VS. REPUBLIC CR. APPLICATION NO. 2 OF 2002** the court held that

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond reasonable doubt.....Suspicious however strong cannot provide a basis for inferring guilt which must be proved by evidence.”

Therefore the mere facts that the accused persons left the bar with the deceased does not amount to sufficient evidence that it was they who killed him. Indeed **PW8** went further to tell the court that about five (5) minutes after they all left the bar together, the 1st and 4th accuseds returned and enquired whether the deceased had returned to the bar. If they had killed him they would not be looking for the accused in the same bar. The implication is that the accused persons somehow parted company with the deceased and were trying to trace him. **PW4** the husband to the deceased’s lover told the court that after the four men left to escort accused home the 1st accused returned to the bar and said that the deceased will not return there. There is nothing sinister in that statement. **PW4** states that the 1st accused went on to clarify his statement thus

“He told us that he has taken the deceased to his (the deceased’s) home.....”

There was nothing wrong in escorting the deceased to his home. It could well be that the 1st accused was merely trying to assure **PW4** that the deceased who had been causing embarrassment by misbehaving with the wife of **PW4** had been escorted to his home and would not return to the bar again that night.

PW7 NYEVU KITSAO a fellow villager told the court that on 4th January, 2010 she met the 2nd accused ‘*Babu*’ who had been sent by her husband to deliver some luggage in their home. She paid the 2nd accused Kshs. 30/= for this work. **PW7** claims that as the 2nd accused was leaving he announced to some

children playing nearby **“that someone had been beaten and that person would never make it to Christmas.”** Firstly it is hardly likely that a killer would make such an announcement to children. Secondly **PW7** has not named even one of the children who was given this astounding news. Neither has any one of such children been called to testify in court. This therefore amounts to hearsay evidence and cannot be relied upon by the court. Another witness **PW8** told the court that after the accused persons had escorted the deceased out of the bar he heard the 1st accused and the 4th accused saying

“We have taken him (the deceased) home to Mwaluphamba. He will not return here.....”

Again nothing sinister can be read into this statement. There is nothing to indicate that the two meant anything other than what they had said.

I note that the investigating officer was **PW10 CHIEF INSPECTOR LEONARD BARAZA**. Under cross-examination by defence counsel he stated

“Our investigations revealed that the four accused murdered the deceased.”

PW10 has not given the court the benefit of these investigations that led him to draw such a conclusion. The chain of evidence is not clear. On the whole the prosecution case can be summarized as mere innuendoes, suppositions and suspicion. There is no tangible or concrete evidence to show that it was the four accused or any one of them who attacked and killed the deceased. The ‘*actus reus*’ for the offence of murder has not been proved. I therefore find that no *prima facie* case has been established against any of the accused persons. I therefore enter a verdict of ‘*Not Guilty*’ and I acquit all four accuseds of the charge of murder. They are to be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered in Mombasa this 29th day of October, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Masila for State

Mr. Omari for all three Accused

Mutisya Court Clerk